

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs January 23, 2002

**STATE OF TENNESSEE v. NELSON KEITH FOSTER**

**Appeal from the Circuit Court for Sullivan County**  
**No. S41,577     R. Jerry Beck, Judge**

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**No. E2001-01259-CCA-R3-CD**  
**March 7, 2002**

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The defendant, Nelson Keith Foster, entered a plea of guilt to violation of a motor vehicle habitual offender order. See Tenn. Code Ann. § 55-10-601 (Motor Vehicle Habitual Offenders Act). The trial court imposed a Range II sentence of three years. After an evidentiary hearing, the trial court denied a defense motion to withdraw the guilty plea and ordered a three-year period of probation. Because he had filed his motion to withdraw the guilty plea prior to the entry of judgment, the defendant contends that the trial court erred by denying relief. The judgment is affirmed.

**Tenn. R. App. P. 3; Judgment of the Trial Court Affirmed**

GARY R. WADE, P.J., delivered the opinion of the court, in which JOSEPH M. TIPTON and JAMES CURWOOD WITT, JR., JJ., joined.

Mark H. Toohey, Kingsport, Tennessee, for the appellant, Nelson Keith Foster.

Paul G. Summers, Attorney General & Reporter; Renee W. Turner, Assistant Attorney General; and Joseph E. Perrin, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

The facts are not in dispute. On September 9, 1994, the defendant was declared a habitual traffic offender and prohibited from driving on a public road. The judgment was based upon an August 15, 1992, conviction for driving on a suspended license; an August 25, 1992, conviction for driving on a suspended license; and a February 1, 1993, conviction for driving on a suspended license.<sup>1</sup> On June 27, 1997, Kingsport Police Officer Todd Harrison saw the defendant driving a blue Chevrolet van on Lincoln Street. Officer Harrison, who was riding a bicycle, recognized the

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<sup>1</sup>On January 2, 2001, this court affirmed an earlier judgment of the trial court refusing to allow the defendant to withdraw guilty pleas to three separate counts of violating the Motor Vehicle Habitual Offender Act. State v. Nelson Keith Foster, No. E1999-02778-CCA-R3-PC (Tenn. Crim. App., at Knoxville, Jan. 2, 2001).

defendant because he had arrested him on an earlier occasion for driving on a suspended license. The officer attempted to make a stop but the defendant sped away.

A presentment charging the defendant with violating the order prohibiting his driving was issued by the Sullivan County Grand Jury on July 22, 1998. On November 12, 1999, the defendant entered a guilty plea which was approved by the trial court. A presentence investigation report was filed. Prior to the entry of the judgment, the defendant filed a motion to set aside the guilty plea on April 10, 2000. Eleven months later, a hearing ensued on the motion and the trial court denied relief and entered judgment. The face of the judgment indicates that sentence was imposed November 29, 1999, some four and one-half months before the filing of the motion to withdraw the guilty plea.

The defendant moved to withdraw his guilty plea based in part on his interpretation of Tennessee Code Annotated section 55-10-603 which, he argues, either provides or should provide that driving on a suspended license qualifies as a predicate offense under the Motor Vehicle Habitual Offenders Act only if the original suspension of the license was based on something more serious than unpaid traffic citations. In addition, the defendant points to an amendment to Tennessee Code Annotated section 55-10-615 which became effective on July 1, 2000, some three years after this offense. The amendment establishes that a suspended license offense may not be the basis for the declaration of an individual as a motor vehicle habitual offender unless the license was suspended for reasons set forth in Tennessee Code Annotated section 55-10-603(2)(A)(i-vi). The new language provides as follows:

(c) Notwithstanding subsections (a) or (b) or any other provision of law to the contrary, if a person is declared to be a habitual motor vehicle offender and one (1) or more of the requisite convictions was for driving while unlicensed as prohibited by title 55, chapter 50, part 3, or driving on a cancelled, suspended or revoked license as prohibited by § 55-50-504 where the underlying violation of § 55-50-504 was not an offense enumerated in § 55-10-603(2)(A), such person may petition the court where such habitual offender finding occurred or any court of record having criminal jurisdiction in the county in which such person then resides for immediate restoration of the privilege to operate a motor vehicle in this state. After reviewing such a petition, if the court finds that one (1) or more of such requisite convictions was for driving while unlicensed as prohibited by title 55, chapter 50, part 3, or for § 55-50-504 where the underlying offense was not one enumerated in § 55-10-603(2)(A), then the court shall restore to such person the privilege to operate a motor vehicle in this state upon such terms and conditions as the court may prescribe . . . .

Tenn. Code Ann. § 55-10-615(c).

At trial, the state conceded that the amendment, which did not become effective until well after this offense, meant that the defendant would no longer qualify as a habitual motor vehicle offender. The state maintained, however, that the provisions of Tennessee Code Annotated section 39-11-112 permitted the continuation of the prosecution under prior law. That statute provides as follows:

Whenever any penal statute or penal legislative act of the state is repealed or amended by a subsequent legislative act, any offense, as defined by the statute or act being repealed or amended, committed while such statute or act was in full force and effect shall be prosecuted under the act or statute in effect at the time of the commission of the offense. Except as provided under the provisions of § 40-35-117, in the event the subsequent act provides for a lesser penalty, any punishment imposed shall be in accordance with the subsequent act.

At the time of this offense, Tennessee Code Annotated section 55-10-603 included as a qualifying offense any "violation of § 55-50-504, relative to driving on a canceled, suspended, or revoked license . . . ." Tenn. Code Ann. § 55-10-603(2)(A)(x) (1998). There was no exception for a suspension which was based entirely upon incidents of failure to pay traffic citations. The July 1, 2000, amendment not only excluded failure to pay traffic citations as a predicate offense but also afforded an opportunity for relief to those whose licenses had been suspended for non-payment of citations. On November 27, 2001, some two years after the conviction in this case, the trial court vacated the September 9, 1994, Motor Vehicle Habitual Offender order as provided by the amendment.

Because the plain language of the statute at the time of this offense clearly applies to the defendant, the question is really whether the changes in the law warranted approval of his request to withdraw the guilty plea. The guiding principles of law are well settled. A defendant who submits a guilty plea is not entitled to withdraw the plea as a matter of right. State v. Turner, 919 S.W.2d 346, 355 (Tenn. Crim. App. 1995). In appropriate cases, trial courts have the authority to set aside a guilty plea after its acceptance. State v. Burris, 40 S.W.3d 520, 524 (Tenn. Crim. App. 2000). Under Tennessee Rule of Criminal Procedure 32(f), a defendant's motion to withdraw a plea of guilty filed before the imposition of sentence may be granted upon a showing "of any fair and just reason"; however, after sentencing but prior to a final judgment, such a motion to withdraw a guilty plea may only be granted to correct a "manifest injustice." While the principle of manifest injustice encompasses constitutional violations, it also may include situations where there was a clear injustice without a constitutional deprivation. State v. Antonio Demonte Lyons, No. 01C01-9508-CR-00263, slip op. at 16 (Tenn. Crim. App., at Nashville, Aug. 15, 1997). Whether there has been manifest injustice is determined by the courts on a case-by-case basis. State v. Turner, 919 S.W.2d at 355. In Turner, this court observed as follows:

A trial court may permit the withdrawal of a plea of guilty to prevent "manifest injustice" when it is established that the plea was entered due to (a) "coercion, fraud, duress or mistake," (b) "fear," (c) a "gross misrepresentation" made

by the district attorney general, or an assistant, (d) the district attorney general, or an assistant, withholds material, exculpatory evidence, which influences the entry of the plea, or the plea of guilty was not voluntarily, understandingly, or knowingly entered. Conversely, the trial court will not, as a general rule, permit the withdrawal of a plea of guilty to prevent "manifest injustice" when the basis of the relief is predicated upon (a) an accused's "change of heart," (b) the entry of the plea to avoid harsher punishment, or (c) an accused's dissatisfaction with the harsh punishment imposed by the trial court or a jury.

Id. (footnotes omitted). The withdrawal of a guilty plea is a matter of the sound discretion of the trial court. State v. Davis, 823 S.W.2d 217, 220 (Tenn. Crim. App. 1991). Our scope of review is, therefore, limited to an abuse of that discretion.

It was stipulated that at the time of the entry of the defendant's guilty plea, there was a valid order declaring the defendant to be a habitual motor vehicle offender. After argument, the trial court found that because the order was effective at the time of the offense, the defendant had failed to carry his burden of demonstrating that a manifest injustice would result unless he was allowed to withdraw his guilty plea. Because Tennessee Code Annotated section 39-11-112 specifically provides for a continuation of the prosecution even with a change in the law and even if the amendment authorized vacation of the prior order under these facts, this court cannot hold that the trial court abused its discretionary authority by denying the motion to withdraw the guilty plea. No manifest injustice resulted. It is undisputed that the defendant did, in fact, drive on the public streets despite a valid order prohibiting him to do so.

Accordingly, the judgment is affirmed.

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GARY R. WADE, PRESIDING JUDGE